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Reply to
Nashville Office

November 17, 2004

Chairman Pat Miller
Attn: Sharla Dillon
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

VIA HAND DELIVERY

RE: Petition of King's Chapel Capacity, LLC for a Certificate of Public Convenience and Necessity to Provide Wastewater Service – Docket No. 04-00335

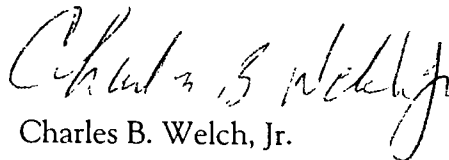
Dear Chairman Miller:

Please find enclosed an original and 14 copies of the above referenced petition. The Petitioner, King's Chapel Capacity, LLC has employed additional counsel who has drafted the referenced response. Although I will continue my representation of the petitioner, Richard Militana is filing this response and will appear as co-counsel.

Thank you for your assistance regarding this matter. If you have any questions, or if I may be of further assistance, please do not hesitate to contact me.

Very truly yours,

FARRIS MATHEWS BRANAN
BOBANGO HELLEN & DUNLAP, PLC


Charles B. Welch, Jr.

CBW/ale

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

November 17, 2004

***IN RE: Petition of King's Chapel Capacity) Docket No.: 04-00335
LLC for Certificate of Convenience and)
Necessity to Serve an Area in Williamson,)
County, Tennessee, Known as Ashby)
Community.)***

**KINGS CHAPEL CAPACITY, LLC'S RESPONSE TO TENNESSEE
WASTEWATER SYSTEMS, INC.'S PETITION TO INTERVENE**

Kings Chapel Capacity, LLC ("KCC") responds, by and through its undersigned attorneys, to the Petition to Intervene by Tennessee Wastewater Systems, Inc ("TWS") pursuant to Tennessee Code Annotated § 4-5-310(a) by stating that the Petition to Intervene as filed by TWS is facially and fatally defective and should be denied and KCC requests an expedited hearing process by the Tennessee Regulatory Authority ("TRA"), and states as follows

SUMMARY OF ARGUMENTS AND RESPONSES

TWS Argument: I. TWS argues that it was granted exclusive rights to "provide service" to the "same area that King's Chapel Capacity, LLC is petitioning to serve"

KCC Response: A reading of the TRA Order granting TWS a CCN clearly does not grant any exclusive rights to TWS. Intervener offers no evidence of a monopoly granted by TRA it now asserts, a fact self evident within the four corners of the TRA Order

TWS Argument: II TWS argues that *"it already has a CCN to provide service to this area, (and) King's Chapel Capacity, LLC cannot be granted a CCN to serve the same area "*

KCC Response: Again TWS's CCN is none exclusive (see Order attached to TWS's Petition to Intervene), TWS has no ability to provide service to this area since it has neither built its own plant nor does it own a plant capable of servicing Kings Chapel Subdivision, TWS has lost or is in the process of losing its SOP for Kings Chapel subdivision, as evidenced by official letter from TDEC to TRA and published by TRA on TRA's website (under active Docket #: 04-00335) wherein TDEC disclosed its intention, for cause, to terminate the SOP granted to TWS and grant it to another entity capable of providing service in compliance with its rules and regulations. Therefore, TWS has no standing to intervene in this matter.

TWS Argument: III. TWS further argues that *"TWS has a contract with the developer of the community at issue in this docket to provide wastewater services "*

KCC Response: Regarding TWS assertion that it has a contract to *"provide wastewater services"* to this area between the interested parties to this action is false. TWS attaches a contract between TWS and Powell, LLC, not between TWS and Ashby Communities, LLC, the admitted developer. Additionally, TWS has neither the plant nor capacity to provide wastewater services to this area. Also note that the contract attached to the TWS Petition to Intervene is not a provider agreement as alleged, does not contain any language to establish the right to operate the plant, but is on its face a construction, inspection and maintenance agreement not a CCN provider agreement. Finally, the contract TWS attaches to its Petition to Intervene is on face and "unlawful" contract as it

seeks enforcement for its construction, supervision, inspection and maintenance services by unlicensed contractors in direct violation of T.C.A. § 62-6-103 as neither TWS nor On Site Capacity Development Company were licensed contractors in as required by entities performing services under T.C.A. § 62-6-102 (see also affidavits from State Officials as Exhibits A, B, and C) In fact under Tennessee law TWS cannot return the project or site under the same contract they attach to their Petition to Intervene or under any new contract (see TCA § 62-6-120)

TWS Argument: IV. TWS finally argues that it has an interest in the outcome of these proceedings and that their intervention will not delay this process

KCC Response: TWS CCN for the area in question is non-exclusive, TWS has no plant which can service this area, the SOP for this area granted to TWS is being terminated by TDEC: therefore TWS cannot have any interest in the outcome of this matter save only delay of this process causing irreparable harm and injury to the public being served and the development.

ARGUMENT

1. A clear reading of the unambiguous TRA order attached to the Petition to Intervene does not grant TWS exclusive rights to this area as claimed by TWS Nor does the TRA Order permit TWS, under the asepis of exclusivity or monopoly, to coerce developers into paying, under an unlawful construction contract, exorbitant utility inspection fees and utility bonding fees cloaked within construction contract as legitimate construction costs. TWS in cannot under any law demand that the developer “gift” the approximately one million dollar plant to TWS without any consideration. before they will undertake their obligations and duty to operate a plant TWS asserts this fraud to be a

“creative business plan” KCC asserts this to be unlawful and fraudulent and an abuse of the CCN granted to TWS by the TRA, and supports that position by the facts and laws contained herein

2. KCC also takes the position that with the grant of rights under the CCN comes the obligation to provide service to the area TWS has failed to provide service to this area and seeks an indirect condemnation of KCC's plant by refusing to provide service in operating the plant, they assert only they can provide, unless KCC pays upon an unlawful construction contract (attached to the Petition to Intervene) a company also owned by the Pickneys, and the plant is then gifted to them free and clear, causing an unjust and unlawful aggrandizement of almost two million dollars (approx one million demanded upon the unlawful contract and approx one million in value in the requested transfer of the plant to TWS)

Of importance is the fact that the contract attached to the Petition to Intervene is not a “wastewater services” contract as represented by TWS, but a construction contract involving unlicensed contractors. A fact clear upon the face of the construction contract itself (more specifically set out below) TWS has falsely misrepresented this contract to the TRA as being a “service provider contract” when it is in fact a “construction contract” by its own unambiguous terms. (set out below)

3 Since TWS has elected not to provide service to this area by building its own wastewater facility and has no provider agreement, its rights are not and cannot be adversely affected by these proceedings for the reasons above and those which are more specifically set out below.

4. In order for TWS to successfully intervene pursuant to TCA §4-5-310 TWS must show unto this agency “ *..facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law* ”

5 TWS has failed in its Petition to Intervene to (1) establish facts upon which this agency may properly rule. TWS was obligated under TCA §4-5-310 to demonstrate that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding” or (2) that “the petitioner qualifies as an intervenor under any provision of law” TWS has done neither.

6. The Petition to Intervene consists of three paragraphs, summarized below:

A §1. Statement that TWS has a Certificate of Convenience and Necessity

(“CNN”) to serve the same area that Kings Chapel Capacity, LLC

(“KCC”) is petitioning to serve in Williamson County, TN

B. §2 Consists of two arguments, First, TWS maintains that since it already has a CCN to provide service to this area, KCC cannot be granted a CCN to serve the same area. Second, TWS alleges that it has a contract with the developer of the community at issue to provide wastewater services

C §3 TWS asserts that the outcome of these proceedings will have a direct impact on the rights, duties, privileges, immunities or other legal interests of TWS

7 KCC would more specifically answer paragraphs 1 though 3 as follows:

§1. KCC would admit that TWS was granted an expansion of its CCN to provide service to Williamson County, TN.

§2 As to TWS's first argument. KCC maintains that the right of TWS to "provide service to an area" is non-exclusive and carries with it the responsibility and duty to actually provide such service to that area. In the current matter TWS has not provided service to the area in question, has not alleged an ability to provide service to this area and has failed to allege an intention to build any facility to provide service to the area in question. TWS therefore has no arguable right to contest KCC's application for a CCN where KCC has the facility and ability to service the area in question.

As to TWS's second argument in §2, KCC maintains that the contract provided as an exhibit to and in support of the Petition to Intervene is fatally defective and unlawful contract in the following regards:

- a The contract attached by TWS is on its face a construction, inspection and maintenance contract, it is not a service provider contract. Therefore, the construction contract is not the proper subject of review by TRA. TWS improperly seeks enforcement and recognition of this construction contract by TRA in that TWS cannot seek judicial enforcement of this construction contract as neither TWS nor On Site Capacity Development Company, Inc. are licensed contractors rendering the contract unlawful under Tennessee law. (See Exhibits A and B, Affidavit from State Official establishing that neither TWS nor OCDC are licensed contractors; see also affidavit of attorney, Nick Romer, (see Exhibit C) establishing that no service provider contract exists by TWS own admission) Under Tennessee law it is unlawful for entities to provide construction services of this kind unless they are licensed contractors. Neither TWS nor OCDC are licensed contractors. Therefore, TWS seeks to have an unlawful construction contract accepted and acknowledged by the TRA. The TRA must not only abide by all laws in the State of Tennessee they must enforce them as they relate to matters before them. TWS has

placed an unlawful contract before the TRA and it must now deal with it appropriately (see Memorandum of Law below)

- b Notwithstanding, the construction contract offered by TWS is further fraudulent on its face in that it is purportedly signed by TWS and OCDC one month before its existence rendering it fraudulent on its face. (see Memorandum of Law below)
- c The construction contract offered by TWS is not between TWS and the developer of Kings Chapel Community but references a non-existent entity, John Powell, LLC not before this agency

C. §3. TWS asserts that the outcome of these proceedings will have a direct impact on the rights, duties, privileges, immunities or other legal interests of TWS. However TWS, has not only failed to provide this agency with any facts “demonstrating that the petitioner has in fact any legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding” (see TCA § 4-5-310(a)(2)) certainly not in seeking enforcement by this agency of the unlawful construction contract it attached to its Petition to Intervene with TWS and OCDC acting unlawfully as unlicensed contractors, a purported contract signed and dated by TWS and OCDC one month before the existence of the contract .

The granting of the Petition to Intervene will serve only the misconduct of TWS and not the interests of justice or the public and will impair the orderly and prompt conduct of the proceedings,

MEMORANDUM OF LAW

It is well settled law in Tennessee that the TRA must ensure that the provisions of Acts 1995, ch. 305 and all laws of this state over which they have jurisdiction are

enforced and obeyed, that violations thereof are promptly prosecuted, and all penalties due the state are collected

TCA §65-1-213. Enforcement — Duties of authority.

It is the duty of the Tennessee regulatory authority to ensure that the provisions of Acts 1995, ch. 305 and all laws of this state over which they have jurisdiction are enforced and obeyed, that violations thereof are promptly prosecuted, and all penalties due the state are collected.

The contract offered by TWS in its Petition to Intervene was and remains an unlawful construction contract under Tennessee Code Annotated §62-6-103. Under the construction contract offered to this agency by TWS, TWS constructed itself or forced an entity to enter into a construction contract for the construction of a wastewater system by unlicensed contractors which is prohibited and declared “unlawful” under TCA §62-6-103. Neither Tennessee Wastewater, Systems, Inc. or Onsite Capacity Development, Inc. parties to the asserted contract were licensed contractors (See Exhibits A and B, true copies of State Agencies evidencing that neither entity were licensed contractors as required, see.

TCA §62-6-103. License requirement — Recovery of expenses by unlicensed contractor

(a)(1) Any person, firm or corporation engaged in contracting in this state shall be required to submit evidence of qualification to engage in contracting, and shall be licensed as hereinafter provided. **It is unlawful for any person, firm or corporation to engage in or offer to engage in contracting in the state, unless such person, firm or corporation has been duly licensed under the provisions of this chapter.** as hereinafter provided. Any person, firm or corporation engaged in contracting, including such person, firm or corporation that engages in the construction of residences or dwellings constructed on private property for the purpose of resale, lease,

rent or any other similar purpose, shall be required to submit evidence of qualification to engage in contracting, and shall be licensed. It is unlawful for any person, firm, or corporation to engage in, or offer to engage in, contracting as hereinabove described, unless such person, firm or corporation has been duly licensed under the provisions of this chapter

Tennessee Code TITLE 62 PROFESSIONS, BUSINESSES AND TRADES CHAPTER 6 GENERAL CONTRACTORS
**Update notice A new part has been added to this chapter by CHAPTER NO 826 OF THE PUBLIC ACTS OF 2004. PART 1 — GENERAL PROVISIONS

§62-6-102 Chapter definitions

As used in this chapter, unless the context otherwise requires:

(1) "Commercial building contractors" are those contractors authorized to bid on and contract for every phase of the construction, direction, alteration, repair or demolition of any building or structure for use and occupancy by the general public,

(2) **"Contracting" means any person or entity who performs or causes to be performed any of the activities defined in subdivision (3)(A) or (6).**

(3)(A) **"Contractor" means any person or entity who undertakes to, attempts to, or submits a price or bid or offers to construct, supervise, superintend, oversee, schedule, direct, or in any manner assume charge of the construction. alteration, repair, improvement, movement, demolition, putting up, tearing down, or furnishing labor to install material or equipment for any building, highway, road, railroad, sewer, grading, excavation, pipeline, public utility structure. project development, housing, housing development, improvement, or any other construction undertaking for which the total cost of the same is twenty-five thousand dollars (\$25,000) or more**

Additionally, the Supreme Court of Tennessee has ruled that an unlawful construction contract, such as the one offered to the TRA by TWS herein, cannot be enforced. The offending party (here TWA and OCDC) are not entitled to benefit from the

unlawful contract and are relegated to recovering only out of pocket expenses proven by clear and convincing evidence before a court of equity. The Supreme Court of Tennessee went on to establish that to permit enforcement of an unlawful contract would be against public policy. TWS has improperly attached such an unlawful contract to support its Petition to Intervene to the TRA and seeks the TRA's recognition and enforcement of this unlawful construction contract, a request TRA cannot grant and one which is unique by statute and case law to the Courts of Equity. In fact the TRA must deny the Petition to Intervene if it is to fulfill its obligations to enforce the laws of this State. See Kyle v Williams, 98 S.W 3d 661 (Tenn. 2003) wherein the Tennessee Supreme Court negated the argument of TWS, namely that the basis of their legal argument for Intervention was the enforcement of the unlawful contract they attached and now seek to have TRA recognize and enforce.

Kyle v Williams, 98 S W 3d 661 (Tenn. 2003)

“ Moreover, prior to the enactment of Section 62-6-103(b), unlicensed contractors had no right to recover based on quantum meruit — the reasonable value of the benefits received and retained. See *id.* at 542 (“[I]n our jurisdiction, **quantum meruit has been specifically considered and rejected.**”). In explaining these rules, this Court in *Farmer* adopted the following rationale from a decision of the Washington Supreme Court...:

The [contractor's licensing] statute was designed for protection of the public. **The overriding public policy must not be defeated by an attempt to accommodate one who has violated its specific provisions, albeit unwittingly.** The law will be nullified if noncomplying contractors are permitted to evade the statute by a claim of ‘unwitting violation’ or ‘undue loss’ or by a claim that the other contracting party will be ‘unduly enriched.’ Every noncomplying contractor could raise one or all of the suggested defenses. The remedy for those who find themselves in the position of appellant lies with the legislature. .”

Any reading of the contract attached to the Petition to Intervene will evidence that it is only a construction contract and not a service provider agreement as misrepresented by TWS to this agency. Please note paragraph 4, page 1 of the "Sewer Contract for Meadowbrook Subdivision" submitted by TWS (emphasis added)

"The contractor is to perform all of the necessary work for the design and installation of treatment and disposal systems, completely install same at no cost whatsoever the Utility, all in accordance with plans and specification hereinabove referred to, and for that purpose has entered into a contract for completion of this work. "

Nowhere in this construction contract is the term provider or service provider even used and nowhere in the contract is there language which would be consistent with a service provider agreement. In fact, the contract specifically states its purpose in the quote above, was for "completion of the installations contracted for herein" (page 2, §6 of the construction contract)

Moreover, TWS does not own a plant capable of servicing the needs of Kings Chapel, nor does it allege to have one. TWS has no property rights to KCC's wastewater property and/or plant including, without limitation, by virtue of the contract provided to TRA, legal transfer of real estate, or by TDEC's issuance of an SOP (State Operating Permit) to TWS. See Rule 1200-4-5-.07 TERMS AND CONDITIONS OF PERMITS below.

RULES OF TENNESSEE DEPARTMENT OF ENVIRONMENT
AND CONSERVATION DIVISION OF SOLID WASTE
MANAGEMENT

CHAPTER 1200-4-5 EFFLUENT LIMITATIONS AND
STANDARDS

Rule 1200-4-5- 07 TERMS AND CONDITIONS OF PERMITS

“(1) When a permit is granted it shall be subject to the provisions of Section 69-3-101, et seq Tennessee Code Annotated, these regulations, and any special terms or conditions the commissioner determines are necessary to fulfill the purposes or enforce the provisions of that section

(a) Duty to comply The permittee must comply with all conditions of this permit Any permit noncompliance constitutes a violation of the Water Quality Control Act and is grounds for enforcement action, for permit termination, revocation and reissuance, or modification, or denial of a permit renewal application ..

(d) Permit actions This permit may be modified, revoked and reissued, or terminated for cause The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition Causes for such permit action include but are not limited to the following:

1 Violation of any terms or conditions of the permit,

(e) Property rights. This permit does not convey property rights of any sort, or any exclusive privilege.”

Additionally, the argument by TWS that it has exclusive rights to the territory in question, in essence a monopoly, is also without merit. The TRA did not provide TWS with the monopoly they represent A fair reading of the TRA’s Order Approving Petition of On-Site Systems, Inc. to amend its Certificate of Convenience and Necessity for expansion of Service Area provided only that “The Petition of On-Site Systems, Inc to amend its Certificate of Convenience and Necessity to expand its service territory to include a portion of the Milcrofton Utility District in Williamson County is hereby approved.” No exclusive or monopolistic language was used by the TRA and none should be implied Therefore, the argument of TWS that it possesses a monopoly in that that it and only it can service this area is meritless TWS’s position that they can elect not to provide service by their own action and instead utilize their CCN to represent that

TRA granted them monopoly, exclusive to an area, in order to force developers to build plants for them, requiring the developers to pay unlicensed contracting entities owned by them, and then force the developers to gift the plant to TWS without any consideration whatsoever, before TWS will execute a service contract to operate a plant is not only unfair and improper, it is unlawful and constitutes an unlawful conspiracy being practiced by TWS under the authority granted by TRA

Under the facts of this case the conduct of TWS may well constitute “extortion” under T C A §65-4-122 upon which the TRA is charged with enforcing pursuant to TCA §65-1-213. The extortive conduct includes but is not limited to preferences being enforced by TWS for companies it owns or controls See

Tennessee Code
TITLE 65 PUBLIC UTILITIES AND CARRIERS CHAPTER
4 REGULATION OF PUBLIC UTILITIES BY AUTHORITY
PART 1 — GENERAL PROVISIONS

T C A §65-4-122 Discriminatory charges — Reasonableness of rates — Unreasonable preferences — Penalties

(a) If **any common carrier or public service' company, directly or indirectly, by any special rate, rebate, drawback, or other device, charges, demands, collects, or receives from any person a greater or less compensation for any service within this state than it charges, demands, collects, or receives from any other person for service of a like kind under substantially like circumstances and conditions, and if such common carrier or such other public service company makes any preference between the parties aforementioned such common carrier or other public service company commits unjust discrimination, which is prohibited and declared unlawful.**

(b) **Any** such corporation which charges, collects, or receives more than a just and reasonable rate of toll or compensation for service in this state commits extortion, which is prohibited and declared unlawful.

(c) It is unlawful for any such corporation to make or give an undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic or service, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic or service to any undue or unreasonable prejudice or disadvantage.

(d) Any such corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person locality, or to any description of traffic an undue or unreasonable preference or advantage, shall be fined in any sum not less than five hundred dollars (\$500) nor more than two thousand dollars (\$2,000)

(e) An action may be brought by any person against any person or corporation, owning or operating such public service company in Tennessee, for the violation of this section, before any court having jurisdiction to try the same.

TWS cannot by virtue of the unlawful contract they attach to their Petition to Intervene ever return the job site or project under Tennessee Laws IWS requests that this agency (TRA) endorse and in fact enforce an unlawful activity by granting a Petition Intervene based upon an unlawful contract See:

§62-6-120. Penalties.

(a)(1) Any person, firm or corporation who engages or offers to engage in contracting without a license as required by § 62-6-103, or who violates the terms and conditions of any license or renewal granted by the board pursuant to this chapter, commits a **Class A misdemeanor**. The penalties imposed by this subdivision shall not apply to a person who engages a contractor without a license for the purpose of constructing a residence for the use of such person.

(2) Any person, firm or corporation who engages or offers to engage in contracting without a license as required by § 62-6-103 is ineligible to receive such license until six (6) months after a determination by the board that a violation has occurred. **Additionally, no such person, firm or corporation shall be awarded any contract for the project upon which it**

engaged in contracting without a license or permitted to participate in any rebidding of such project.

For the foregoing reasons, the TRA must not only deny TWS's Petition to Intervene, but is legally obligated to revoke TWS certificate of need as it applies to Williamson County. TWS has by its own exhibit before this agency provided uncontested evidence of its unlawful, fraudulent and improper conduct, under TCA §68-11-1619

TCA §68-11-1619. Revocation of certificate of need — Grounds.

In addition to any other grounds for revocation provided by other statutes, rule of law, or equity, the agency has the power to revoke a certificate of need whenever any of the following has occurred:

- (1) The holder of a certificate of need has not made substantial and timely progress toward the completion of the project or acquisition of the equipment;**
- (2) The acquisition or project as described in the person's application has been changed or altered in such a manner as to significantly deviate from the acquisition or project approved by the agency when the certificate of need was granted;**
- (3) The decision to issue a certificate of need was based, in whole or in part, on information or data in the application which was false, incorrect, or misleading, whether intentional or not;**
- (4) The holder of the certificate of need has committed fraud in obtaining the certificate of need or has committed fraud upon the agency after the certificate of need was issued. For purposes of this section, "fraud" means any form of deceit, trickery, misrepresentation, or subterfuge, including, but not limited to, any of the following actions:**
 - (A) Making a knowingly false statement, orally or in writing, in connection with a certificate of need application or project subject to the jurisdiction of the agency;**

(B) Intentionally withholding or suppressing information which the person knows, or reasonably should know, is relevant to a certificate of need application or project subject to the jurisdiction of the agency;

(C) Altering, forging, or otherwise modifying, with fraudulent intent, any document submitted to the agency in connection with any certificate of need application or project subject to the jurisdiction of the agency; or

(5) The violation of any condition placed upon a certificate of need by the agency, prior to licensure by the department of health or department of mental health and developmental disabilities.

CONCLUSION

TWS states that it currently has a Certificate of Convenience and Necessity ("CCN") to "*serve the same area*" that Kings Chapel Capacity, LLC is petitioning to serve. However, TWS fails to allege in its petition to intervene that it owns, operates or controls a wastewater plant which could "*serve the same area*" that Kings Chapel Capacity, LLC. TWS has no ability to provide service to the same area that Kings Chapel Capacity, LLC is petitioning to serve. Kings Chapel Capacity, LLC has the plant and the ability to serve the area in question and has properly applied to service its area. TWS therefore has no interest in these proceedings since it has failed to provide service through its own plant to serve this community. It has incurred no expenses with respect to servicing this community and has in fact been unjustly enriched by payment under an unlawful contract. TWS makes two additional arguments. First, TWS maintains that since TWS already has a CCN to provide service to this area, KCC cannot be granted a CCN to serve the same area. The fatal defect in this argument is obvious, TWS does not allege, nor can it, any ability to provide service to this development either by existing

wastewater facility or expansion of an existing wastewater facility it owns, rendering the Petition to Intervene meritless. On the other hand KCC does have the current ability to provide service to this community by a new almost complete facility it owns.

TWS alleges that it has a contract with the developer of the community at issue to “*provide wastewater services*.” However, what TWS provides to this agency is a facially and fatally defective unlawful “construction contract” not a “wastewater service contract.” The contract Intervener attaches to its petition is between TWS, Onsite Capacity Development Company, (“OCDC”) and John Powell, LLC, Ashby Communities, LLC (“Ashby Community”) the admitted developer is not a party to that contract. **TWS has not and cannot provide a wastewater service contract, or any contract, between TWS and Ashby Communities, LLC., the developer of Kings Chapel, rendering the Petition to Intervene materially and fatally defective by TWS’s own allegations and exhibit.** The TRA, therefore, does not have jurisdiction over Powell LLC and therefore does not have jurisdiction over the contract between TWS and Powell, LLC attached to the Petition to Intervene. The TRA is therefore bound to deny the Petition to Intervene as a matter of law and yield the issues to a State Court for resolution. TWS redress is before a court of law to adjudicate issues between TWS and Powell LLC relative to the contract entered into between them and not the TRA regarding issues between TWS and Ashby Communities, Inc.

TWS finally asserts that the outcome of these proceedings will have a direct impact on the rights, duties, privileges, immunities or other legal interests of TWS. However TWS, has not only failed to provide this agency with any facts “demonstrating that the petitioner has in fact any legal rights, duties, privileges, immunities or other legal

interest may be determined in the proceeding" (see TCA § 4-5-310(a)(2)) TWS is only improperly seeking enforcement by this agency of the unlawful construction contract it attached to its Petition to Intervene with TWS and OCDC acting unlawfully as unlicensed contractors, a purported contract signed and dated by TWS and OCDC one month before the existence of the contract .

The granting of the Petition to Intervene will serve only the misconduct of TWS and a defeat provisions of Tennessee Code Annotated cited herein, and not the interests of justice and will impair the orderly and prompt conduct of the proceedings

TWS must comply not only with T C A. § 4-5-310 in filing a Petition to Intervene but must also comply with the UNIFORM RULES OF PROCEDURE FOR HEARING CONTESTED CASES BEFORE STATE ADMINISTRATIVE AGENCIES, Rule 1360-4-1-.12 (set out below) TWS was required within its Petition to Intervene to "*state any and all facts and legal theories under which the petitioner claims to be qualified as an intervenor* " Intervenor has failed to allege any facts or legal theories to support its request to intervene. It has attached to the Petition to Intervene a contract which does not involve any party to the development See

RULES OF THE TENNESSEE DEPARTMENT OF STATE
DIVISION OF BUSINESS SERVICES CHAPTER 1360-4-1
UNIFORM RULES OF PROCEDURE FOR HEARING
CONTESTED CASES BEFORE STATE ADMINISTRATIVE
AGENCIES

§1360-4-1-.12 INTERVENTION.

(1) All petitions for leave to intervene in a pending contested case shall be filed in accordance with T.C.A. § 4-5-310, and shall state any and all facts and legal theories under which the petitioner claims to be qualified as an intervenor.

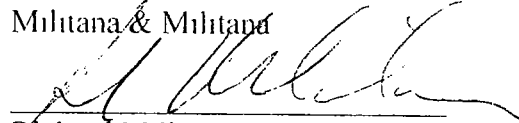
Therefore, Kings Chapel Capacity, LLC respectfully requests that TRA deny the Petition of TWS to intervene on this matter and take such additional action against TWS as it deems appropriate, to include without limitation, the revocation of TWS's CCN

If the Petition to Intervene is granted, KCC requests an expedited hearing on all matters contained herein upon the following grounds:

- a. The contract attached to the Petition to Intervene is "unlawful" on its face pursuant to T C A §62-6-103 and is against the public interest as propounded by the Supreme Court of Tennessee, in *Kyle v Williams* and has and will continue to cause irreparable harm to the public as long as this agency tolerates the unlawful conduct of Tennessee Wastewater Systems, Inc (Intervener)
- b. The wastewater plant is partially completed and in further need of inspection and completion, and under T C A. §62-6-102 neither Tennessee Wastewater Systems, Inc. nor On Site Capacity Development Company can ever return to the jobsite . Therefore, licensed contractors must be engaged to complete the project if the public need is to be served
- c. Williamson County Planning and Zoning time limits continue to expire causing irreparable harm to the development and the public need as it serves
- d. The public need cannot be served unless and until the issue Intervener raises requesting this Agency's endorsement of the unlawful conduct of Intervener is resolved as stated herein

Respectfully Submitted

Militana & Militana


Richard Militana, Esq.

5845 Old Hwy 96

Franklin, TN 37064

(615) 799-5800

TN Bar # 007371

CERTIFICATE OF SERVICE

The undersigned hereby certified that the foregoing document has been served upon the following person/s by hand delivery or by United States Mail, with proper postage thereon and by facsimile

Henry Walker, Esquire
Boult, Cummings, Conners & Berry, PLC
414 Union Street, Suite 1600
P O Box Nashville, Tennessee 37219

This 17th day of November, 2004


Richard Militana



STATE OF TENNESSEE
DEPARTMENT OF COMMERCE AND INSURANCE
BOARD FOR LICENSING CONTRACTORS
500 JAMES ROBERTSON PARKWAY, SUITE 110
NASHVILLE, TENNESSEE 37243-1150
(615) 741-8307 or (800) 544-7693

AFFIDAVIT

STATE OF TENNESSEE
COUNTY OF DAVIDSON
DEPARTMENT OF COMMERCE AND INSURANCE
DIVISION OF REGULATORY BOARDS

IN THE MATTER OF: Onsite Capacity Development Company

Tefise R. Roberts, after being duly sworn deposes and says: "I, Tefise R. Roberts, as an Administrative Assistant at the Tennessee Board for Licensing Contractors, have made a complete and accurate search of the records of the Board office, and find that Onsite Capacity Development Company is not licensed with the State of Tennessee Board for Licensing Contractors" according to T. C. A. Section 62-6-102.

This search took place in the office of the Board for Licensing Contractors, located at 500 James Robertson Parkway, Suite 110 of the Davy Crockett Tower Building in Nashville, Tennessee 37243-1150, on September 1, 2004.

Sincerely,

A handwritten signature in cursive script that reads "Tefise R. Roberts".

Tefise R. Roberts
Administrative Assistant

Sworn to and subscribed before me this 1st day of September 2004.

A handwritten signature in cursive script that reads "Karen A. Cawcayk".
A circular notary seal for Karen A. Cawcayk, Notary Public, State of Tennessee. The seal contains the text "KAREN A. CAWCAYK", "Notary Public", and "STATE OF TENNESSEE".

Notary Public

My Commission Expires: 5-28-06



STATE OF TENNESSEE
DEPARTMENT OF COMMERCE AND INSURANCE
BOARD FOR LICENSING CONTRACTORS
500 JAMES ROBERTSON PARKWAY, SUITE 110
NASHVILLE, TENNESSEE 37243-1150
(615) 741-8307 or (800) 544-7693
FAX - (615) 532-2868

September 7, 2004

TO WHOM IT MAY CONCERN:

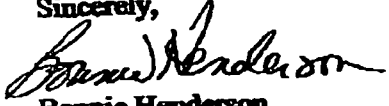
RE: Tennessee Wastewater Systems Inc and On Site Systems Inc.

Dear Ms. Moss:

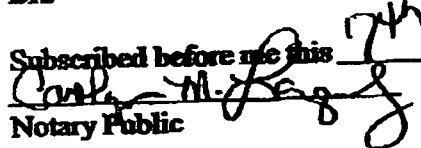
The above contractors are not licensed the Licensing Contractors Board to do projects in the State of Tennessee.

Should you need additional information please feel free to contact me.

Sincerely,


Bonnie Henderson
Licensing Contractors Board.

BH/

Subscribed before me this 7th day of September 2004.

Notary Public

My Commission expires

State

County

10/22/2007

TN

Dickson



AFFIDAVIT

OF

NICHOLAS M. ROMER

I, Nicholas M. Romer, being first duly sworn, have personal knowledge concerning the facts contained herein and do swear as follows:

1. I am an attorney licensed to practice law in Tennessee and reside in Williamson County, Tennessee. I have represented John Powell and business entities with which he is associated.
2. At the request of John Powell, I attended a meeting on April 7, 2004 at Mr. Powell's residence with John Powell and Robert Pickney to acquaint myself with the projected business relationship between Mr. Pickney and Mr. Powell and/or their representative entities then existing or to be formed.
3. At the subject meeting Mr. Pickney represented himself and/or his company Onsite Systems, Inc. to be licensed or chartered as a public utility and in some way empowered by a governing Tennessee regulatory authority to have exclusive right to operate a wastewater treatment facility within a geographic area in which Mr. Powell or his entities owned real property. Mr. Pickney also represented that Onsite Capacity Development Company was a licensed contractor also empowered by Tennessee regulatory authority to build wastewater treatment facilities. Based upon Mr. Pickney's representations, I concluded that Mr. Powell, or his existing or proposed entities, had no alternative but to enter into an agreement with Mr. Pickney and his companies if Mr. Powell intended to have wastewater treatment for real property Mr. Powell or his entities owned.
4. At the April 7, 2004 meeting John Powell and Robert Pickney represented to me that there existed no prior agreement, written or otherwise, respecting any matter between Robert Pickney, or any of the entities with which he was associated, and John Powell, or any of the entities with which John Powell was associated.
5. The charge Mr. Powell gave me at the subject meeting was to draft a first-time agreement between Mr. Pickney and Mr. Powell, or their representative entities, concerning the ownership and operation of a wastewater treatment facility in Williamson County. To assist in that task I was furnished a document entitled "SEWER CONTRACT

FOR CLAY ESTATES SUBDIVISION" to be used as a reference document for drafting the proposed agreement. The document referred to Mr. Pickney's company as a "Utility."

6. The parties to the proposed agreement had not yet been determined by the end of the meeting. Mr. Pickney presented to me a business card carrying the business name Tennessee Wastewater, a business name without designation as to the nature of the entity, i.e. "Inc." or "LLC." When I pointed this out to Mr. Pickney he announced that the entity was a Tennessee corporation. At the time the other party to the agreement was also not confirmed since John Powell intended to form a separate legal entity to be party to the agreement. I recommended that the name "ABC, LLC" be used temporarily in the draft of the proposed agreement until Mr. Powell could form a separate Tennessee entity.

7. On April 12, 2004 I began drafting a proposed agreement between Mr. Pickney's company, Tennessee Wastewater Systems, Inc., and an entity to be formed by John Powell.

8. On April 13, 2004 I emailed to John Powell a draft of the proposed agreement between Tennessee Wastewater Systems, Inc. and ABC, LLC, a fictitious entity, and as of the date of this affidavit I have not made any changes to the draft agreement.

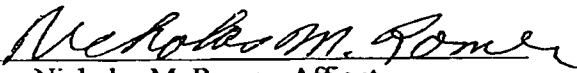
9. On October 20, 2004, John Powell presented me with a document titled "SEWER CONTRACT FOR MEADOWBROOK SUBDIVISION." a document apparently alleged by Mr. Pickney to be an enforceable agreement. The document is attached to this affidavit. The alleged agreement includes among its parties Onsite Systems, Inc, and Onsite Capacity Development Company. respectively characterized as a "Utility" and as a "Contractor."

10. On October 20, 2004, John Powell presented me with two executed statements from the Board For Licensing Contractors, Department of Commerce, State of Tennessee. The two statements are attached to this affidavit. One statement attests that as of September 7, 2004, On Site Systems Inc. and Tennessee Wastewater Systems Inc were not licensed contractors within the State of Tennessee. A second statement attests that as of September 1, 2004, Onsite Capacity Development Company was not a licensed contractor within the State of Tennessee.

11. Title 62, Chapter 6, Part 1, Section 2 of the Tennessee Code Annotated, as amended to Section 62-6-136(a), states that "It is unlawful for any person, firm, or corporation to represent itself as a licensed contractor, or to act in the capacity of a "contractor...while not licensed...."

12. It is the Affiant's opinion that, presuming Onsite Systems, Inc. and Onsite Capacity Development Company (and Tennessee Wastewater Systems, Inc.) were not licensed contractors in Tennessee, and given that conducting business as a contractor without being licensed is illegal in Tennessee, any alleged agreement executed by Onsite Systems, Inc., Onsite Capacity Development Company, or Tennessee Wastewater Systems, Inc. are voidable by an aggrieved party to the agreement.

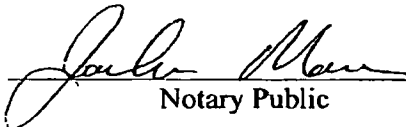
FURTHER YOUR AFFIANT SAYETH NOT.


Nicholas M. Romer, Affiant

I HEREBY CERTIFY THAT ON THIS DAY, before me, an officer duly authorized in Tennessee and in Williamson County to take acknowledgments, personally appeared, and having first been duly sworn, Nicholas M. Romer, to me known to be the person described in and who executed the foregoing Affidavit, and he acknowledged before me that he executed the same and has sworn to its contents.

WITNESS MY HAND AND OFFICIAL SEAL in Williamson County, Tennessee this
21 day of October, 2004.

My commission expires: Oct. 28, 2007


Notary Public

